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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN DOE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Where overwhelming evidence clearly demonstrates very substantial assistance, is an arbitrary refusal to file a sentence correction motion under Rule 35(b), Federal Rules of Criminal Procedure, unconstitutional conduct as applied to defendant, contrary to the Fifth Amendment due process clause and equal protection guarantee?

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JOHN DOE,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, John Doe, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit which affirmed a district court order denying sentence correction relief.

OPINIONS BELOW

The published but as yet unreported opinion of the Court of Appeals, and the unpublished opinion of the District Court are reproduced in the appendix.

JURISDICTION

The Court of Appeals rendered judgment on August 5, 1991. Petitioner invokes the jurisdiction of this Court pursuant to Title 28, United States Code, section 1254(1).

LEGAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

No person shall . . . in any criminal case . . . be deprived of life, liberty, or property, without due process of law . . .

Rule 35(b), Federal Rules of Criminal Procedure:

Correction of Sentence for Changed Circumstances. The court, on motion of the Government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of Title 28, United States Code. The court's authority to lower a sentence under this subdivision includes the authority to lower such sentence to a level below that established by statute as a minimum sentence.

STATEMENT OF THE CASE

Defendant was indicted in the Northern District of Illinois for conspiracy to possess cocaine and for two counts of possession with intent to distribute that controlled substance. The possession offenses each carried a ten year minimum mandatory prison term. The district court had original jurisdiction of the matter pursuant to Title 18, United States Code, section 3231; a jury found defendant guilty of all counts on May 11, 1988.

In July defendant entered into agreements of cooperation with the United States Attorney's Offices for the Eastern District of Louisiana and the Southern District of Florida. The essence of these contracts was that defendant, in exchange for beneficial recommendations to be made by the two offices at sentencing, would provide substantial assistance in the investigation and prosecution of major narcotics offenders.

In August the United States Attorney's Office for the Northern District of Illinois adopted defendant's agreement with the Eastern District of Louisiana in order to interview him. That office then debriefed him.

On September 16, 1988 the district court sentenced defendant on the conspiracy offense to five years probation and on the substantive offenses to concurrent fifteen year prison terms. Defendant did not appeal judgment and sentence.

On December 7, 1988 defendant timely filed a sentence reduction motion. On September 7, 1989 the district court in closed chambers reduced the fifteen year prison terms to the statutory minimum level of ten years.

At the closed hearing, the United States Attorney's Office for the Northern District of Illinois announced that it would not file a sentence correction motion under Rule 35(b), Federal Rules of Criminal Procedure, as amended November 1, 1987. Under the literal terms of that rule, a sentence correction motion is a predicate to further sentence reduction.

Upon that announcement, defendant at the hearing filed a motion for an order which would compel the Northern District to file the Rule 35(b) sentence correction motion. Among his grounds was the argument that a refusal to file

was unconstitutional conduct as applied to him. Supporting the motion was overwhelming evidence which demonstrated that defendant had provided the United States Government with substantial assistance of an extraordinary caliber. Foremost among the benefits obtained from him was the apprehension of a Colombian drug lord viewed by the Department of Justice as one of the most significant cocaine traffickers ever arrested by the government and ranked by the Drug Enforcement Administration as one of its top twelve targets. Other significant benefits were the seizures of drugs and drug moneys, forfeiture actions, and the prosecution of a major narcotics violator operating in Florida. Each government agent familiar with the assistance provided unreservedly testified that defendant's cooperative effort was outstanding. The district court found as a fact that there had been very substantial assistance which redounded to the benefit of the government. (Sealed Transcript of the September 7, 1989 In-Camera Hearing, pp. 12-20; 26-29; 36-37; 59-60; 63).

The refusal of the Northern District to file a sentence correction motion on defendant's behalf was arbitrary in view of his extraordinary substantial assistance. The arbitrariness is underscored by the substantial assistor status given a witness in this case whose pretrial effort the Northern District has admitted was half-hearted and whose trial testimony the Northern District has shown was forsworn and protective of an arch trafficker in narcotics. (Sealed Docket Entries 431 & 500).

On September 13, 1989 the district court entered an order denying defendant's motion for Rule 35(b) relief. Among the considerations was the fact that no sentence correction motion had been filed by the government. The order was appealed.

On August 5, 1991 the Court of Appeals for the Seventh Circuit affirmed the district court order denying the relief sought. The court ruled that the government's failure to file a Rule 35(b) motion was not unconstitutional conduct as applied to defendant, and hence, not violative of his rights to due process and equal protection of the law. Significantly, the decision which it rendered scrupulously avoids an articulation of the precise standard to be used for reviewing a government refusal to file a Rule 35(b) motion. Rather, it cites a serious divergence among the circuit courts on the subject and proceeds to dismiss defendant's substantive due process claim simply for want of government bad faith. An arbitrary conduct standard is not employed. The decision also suggests that, regardless of the level of assistance provided, a government refusal implicates no liberty interest sufficient to support a procedural due process claim. It holds lastly that government treatment of defendant disparate from others classified as substantial assistors may not support an equal protection violation. This petition follows.

REASON FOR GRANTING THE WRIT

The Decision Below Conflicts With A Decision Of Another Circuit, Declares An Uncertainty Among The Circuits Regarding A Significant Standard Of Review, And Involves Important Questions Of Federal Law Which Have Not Been, But Should Be, Settled By This Court.

a./ Manifest Substantial Assistance vs. Arbitrariness

This is a controversy involving an arbitrary refusal to file a Rule 35(b) sentence correction motion in the face of manifest substantial assistance. Defendant argued below that the refusal was unconstitutional conduct as applied to him, contrary to the due process clause and the equal

protection guarantee of the Fifth Amendment. In dispensing with his substantive due process argument, the Court of Appeals made reference to a want of prosecutorial bad faith rather than arbitrariness. It chose not to state the precise test to be used on review, noting instead divergence and uncertainty among the circuit courts on the appropriate standard. The Court of Appeals also indicated that an arbitrary refusal against manifest substantial assistance implicated no liberty interest for procedural purposes and that disparate treatment among substantial assistors was irrelevant for equal protection concerns. This case, therefore, presents circuit court conflict and confusion as well as important but unresolved questions of federal law.

Rule 35(b), Federal Rules of Criminal Procedure, states that the court, on motion of the government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense.

After conviction defendant cooperated with the Department of Justice through the United States Attorney's Offices for the Eastern District of Louisiana and the Southern District of Florida. Within one year after his sentence, he was responsible for: seizures of an aircraft, a yacht, $130,000 in bank accounts and more than 400 kilograms of cocaine; forfeiture liens against almost $9 million in property; indictment of a Florida drug kingpin and the arrest of a Colombian drug lord marked by the Department of Justice as one of the most significant cocaine traffickers ever apprehended by the United States and ranked by its Drug Enforcement Administration as one of the nation's top twelve narcotics targets. Overwhelming evidence of these results was manifest, and the district court found that defendant's cooperation constituted very

substantial assistance which had redounded to the benefit of the United States Government.

The United States Attorney's Office for the Northern District of Illinois prosecuted defendant. That office did not contract directly with defendant for his cooperation but accomplished the same result indirectly by interviewing him after adopting the contractual terms which he had reached with the Eastern District of Louisiana. At sentencing, however, and at subsequent reduction hearings, the Northern District adamantly opposed mitigation, notwithstanding the fruition of defendant's assistance. Consistent with this posture, the Northern District refused to file a Rule 35(b) sentence correction motion.

Its decision not to file was arbitrary and capricious. The assistance of defendant went beyond substantial; it was exemplary. But the Northern District, even to a slight degree, would not recognize the success of the cooperation. Its attitude became caprice. For revealing a public enemy, defendant was classified an unsubstantial assistor. Yet, in this very case, the Northern District qualified another individual a substantial assistor who had concealed a comparable public enemy through forsworn testimony. The divergent classifications italicize the irrational character of the Rule 35(b) process as applied to defendant. On appeal the government confessed to a fixed policy against defendant regarding any reduction of his sentence.

Rule 35(b) turns first upon the fact of substantial assistance. Where, as here, that fact is obvious in quality and degree, a decision not to file a motion indicates arbitrariness as applied. The Court of Appeals for the Seventh Circuit, however, would not articulate the precise standard for review; it opted to apply a standard of prosecutorial bad faith and not that of arbitrary conduct.

b./ Conflict And Uncertainty Among The Circuit Courts

The Seventh Circuit majority opinion utilized a bad faith standard without committing itself to a precise review test. Yet a concurring opinion suggested that an arbitrary conduct standard might also be applicable. Consequently, the decision itself is in internal conflict and does not resolve the proper appellate standard for determining when a refusal to file violates substantive due process. More significantly, in discussing the standard of review, the Seventh Circuit declared in footnote 12 that other circuits have struggled with the question of how carefully to review a prosecutor's decision not to file a Rule 35(b) motion and that their answers are as divergent as they are uncertain. It was noted that in *United States v. Smitherman*, 889 F.2d 189, 191 (8th Cir. 1989), the Eighth Circuit indicated that the question **might be** bad faith or arbitrariness; that in *United States v. La Guardia*, 902 F.2d 1010, 1018 (1st Cir. 1990), the First Circuit **hinted** that the standard **might be** arbitrary and capricious; and that in *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1990), the Second Circuit **likened** the refusal to those prosecutorial decisions accorded a high level of deference. Uncertainty, confusion and divergence abound among the circuit courts regarding an important standard of review. This petition should be granted for that reason alone.

The Seventh Circuit decision also conflicts with that of another circuit. Rule 35(b) is one of three sentence reduction provisions which became effective November 1, 1987. The other two are Title 18, United States Code, section 3553(e) (limited authority to impose a sentence below a statutory minimum); and Sentencing Guideline, section 5K1.1 (substantial assistance to authorities). Statute, guideline and rule are worded alike; each beginning its relief with a

government motion, they are clones. Judicial construction of one should be interpretation for all.

In *La Guardia*, the First Circuit affirmed a government refusal to file a Section 5K1.1 motion. Its standard of review was arbitrariness and not prosecutorial bad faith. The court stated that, where there is overwhelming evidence of assistance so substantial as to cry out for meaningful relief, a stubborn refusal to file a motion may be overcome by judicial action; it stated further that governmental intractability in the face of overwhelming evidence of enormously fruitful cooperation may deprive a defendant of his due. *La Guardia*, 902 F.2d at 1017-18. Stubbornness and intractability—these are matters to which a test of arbitrary conduct is addressed. In *United States v. Bannister*, 924 F.2d 21 (1st Cir. 1991), the First Circuit reconfirmed *La Guardia* and enunciated clearly that the standard of review was arbitrary conduct. Here the government refused to file a Section 5K1.1 motion because the assistance was marginal. The First Circuit agreed, stating that a government refusal to file the motion forecloses relief unless the refusal is unmistakably arbitrary and capricious as where the assistance has been so substantial as to cry out for meaningful relief. *Bannister*, 924 F.2d at 22-23. The court added that, where the extent and value of the assistance are not difficult to ascertain, the government's evaluation of it is not entitled to deference. 924 F.2d at 23 n.4; 23.

The standard of arbitrary conduct also has found favor in other circuits. In *Smitherman*, the Eighth Circuit, affirming a decision not to file a Section 5K1.1 motion, stated that the motion was not indispensable for relief but that the case before it was not one which presented a question of prosecutorial bad faith **or** arbitrariness. *Smitherman*, 889 F.2d at 191. In *United States v. Kuntz*, 908 F.2d 655, 657 (10th Cir. 1990) and *United States v. Sorensen*, 915 F.2d 599, 603 (10th Cir. 1990), the Tenth

Circuit quoted *La Guardia* with approval. This petition should be granted to resolve the conflict of whether the review standard should be bad faith or arbitrariness.

c./ Special And Important Considerations Regarding Rule 35(b)

Rule 35(b) no longer represents a simple mercy plea as it did before November 1, 1987. Its total overhaul now implicates a liberty reward in exchange for a significant beneficial act in the war on crime. Its purpose is more substantial than before as it interfaces freedom with a salient national problem. Criminal litigants are presented an opportunity to enter a class affecting their liberty; that opportunity at the same time is a police measure for the general welfare. It is the interests involved and the objectives sought which compel that Rule 35(b) be administered fairly and justly. A standard of prosecutorial bad faith simply is not well suited to accomplish this. It would diminish rather than advance the purpose and function of the new rule.

The bad faith standard imposes a burden of proof which is almost insurmountable. Its focus is vindictiveness, invidious discrimination or selective prosecution based on impermissible considerations such as race, religion or the exercise of a right. *United States v. Bayles*, 923 F.2d 70, 71 (7th Cir. 1991); *Wayte v. United States*, 470 U.S. 598 (1985). It becomes quite certain that use of this standard would render a Rule 35(b) decision virtually inviolate. As significantly, the bad faith standard does not proscribe arbitrary or capricious decision making. Thus, where the prosecution believes that the sentence imposed is sufficient or lenient, the effect of its good faith but arbitrary belief becomes unreviewable even though the defendant may have been responsible for capturing public enemies such as the perpetrators of Pan Am Flight 103. The illustration suggests

that arbitrariness is a standard better suited to implement the new Rule 35(b) regime.

Broad discretion is accorded the government in matters of prosecution. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980). The prerogative is large; it is not unfettered. *United States v. Batchelder*, 442 U.S. 114, 124-125 (1979). Where prosecutorial power affecting liberty is wielded with caprice or upon arbitrary classification, the due process clause and the equal protection component of the Fifth Amendment are implicated. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Martinez v. California*, 444 U.S. 277, 281 (1980); *Wayte*, 470 U.S. at 608.

In the routine case of substantial assistance, a Rule 35(b) filing decision may well be within the scope of prosecutorial discretion. However, as here a case of extraordinary assistance, the act of not filing conflicts with basic substantive and procedural notions implicit in the Fifth Amendment. Were government discretion in the Rule 35(b) process subject to review only upon a bad faith standard, a defendant responsible for apprehending a political assassin in one district could be foreclosed from relief though a defendant making a low-rung drug peddler in another district may be permitted that chance. The suggestion that government may arbitrarily file for one assisting in a minor contraband seizure as it may arbitrarily not file for one capturing an airline bomber is not only irrational but foreign to traditional constitutional thought.

Rule 35(b) interrelates two branches of government to achieve its ends. As such, its construction should be consistent with a check and balance analysis. When substantial assistance is not an obvious fact, the prosecution may refuse to file the motion, and the court is without power to mitigate. But when it is an obvious fact, a refusal to file becomes an abuse of power to be checked. Any other view

permits the new Rule 35(b) system a tolerance of caprice. In this regard the arbitrariness standard of review, rather than any other test, achieves a proper balance between executive and judicial powers under the rule. The bad faith standard simply renders irremediable any injustice resulting from a good faith but arbitrary decision not to file. The powers, interests and policies material to Rule 35(b) are well accommodated, if not best harmonized, under the arbitrary conduct standard. This Court should grant this petition and resolve that, under the due process clause, the judicial branch is empowered to check good faith but arbitrary Rule 35(b) non-filing decisions in clear cases of substantial assistance.

d./ The Procedural Due Process Violation

The due process clause protects liberty and has substantive and procedural components. The former secures against caprice in government action upon protected interests; the latter requires appropriate procedural safeguards for those interests. *DeShaney v. Winnebago County DDS*, 489 U.S. 189, 195-196 (1989). As suggested above, because of the high level of defendant's cooperation, refusal to invoke Rule 35(b) represented an arbitrary exercise of government power and violated his right to substantive due process. *Daniels v. Williams*, 474 U.S. 327 (1986). However, this pocket veto also violated his right to procedural due process.

The due process clause guarantees that a liberty interest may not be compromised apart from appropriate procedural safeguards which insure fairness of decision. *Daniels*, 474 U.S. at 331-332. The Seventh Circuit held that Rule 35(b) implicates no liberty interest. Yet in *Goss v. Lopez*, 419 U.S. 565 (1975), this Court determined that a unilateral ten day school suspension implicated a liberty interest which procedural due process protected against arbitrary

government action. No less status and treatment should be accorded the opportunity for a prison reprieve when a defendant qualifies for it through rendition of very substantial assistance. In this regard the safeguard against unilateral, arbitrary conduct must be the Rule 35(b) court.

e./ The Equal Protection Violation

The government's decision not to file the Rule 35(b) motion also offended the equal protection component of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Seventh Circuit disagreed, holding that the motivation for the prosecution's treating defendant differently from others similarly situated was rationally based. Sufficient for the court was the government's belief that leniency would detract from deterrence. This captures the Seventh Circuit's misunderstanding of Rule 35(b). The rule entrusts to the court the power to grant or deny mitigation; it entrusts to the government the duty to assess the quality of assistance. Therefore, where substantial assistance is manifest, the government's opinion of justice as the reason for withholding a motion usurps the court's prerogative and runs counter to the Rule 35(b) scheme. As such, it may not constitute a rational basis to defeat an equal protection claim.

Rule 35(b) presumes two classes of assistors: one involving substantial help; the other involving help less than that. Where compelling evidence clearly reflects substantial assistance as here, government conduct which arbitrarily classifies the assistor outside of his class violates the equal protection guarantee. *Flemming v. Nestor*, 363 U.S. 603, 611 (1960). Though there is no constitutional right to sentence reduction, once reduction opportunity is afforded by law, as with any other liberty interest, equal protection is implicated. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Wolff v. McDonnell*, 418 U.S. 539 (1973); *Evitts v.*

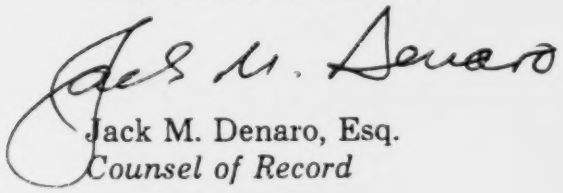
Jucey, 469 U.S. 387 (1985). By not filing a Rule 35(b) motion in the face of obvious substantial assistance, the government classified defendant as an assistor unqualified for sentence relief. This discrimination was arbitrary and unlawful.

Not every classification affecting a liberty interest is unconstitutional. If it is rationally related to the achievement of a legitimate government goal and is not otherwise arbitrary, a classification is consistent with equal protection. *Richardson v. Belcher*, 404 U.S. 78, 81-84 (1971). In *Marshall v. United States*, 414 U.S. 417 (1974), the court considered the exclusion of double felons from rehabilitative commitment. The discrimination was upheld because it bore some relevance to the purpose for which it was created. In reaching its conclusion, this court drew upon basic social facts, common sense and legislative history. A rational basis for the statutory distinction clearly emerged. Here, the government pigeonholed defendant as an unsubstantial assistor. That, however, grossly contrary to the evidence, was but an irrational stamp. It showed no rational relation to the goal for which Rule 35(b) was rewritten nor to the evidence which would engage that rule. It also represented an arbitrary classification as the government accorded substantial assistor status to a witness in the case who had concealed a public enemy through forsworn testimony. As applied to defendant, the refusal to file a Rule 35(b) motion violated his right to equal protection of the law.

CONCLUSION

For the grounds asserted, this Court should grant a writ of certiorari to review the judgment and decision of the court below.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 89-3071

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

JOHN DOE,

Defendant-Appellant

JUDGMENT—WITH ORAL ARGUMENT

Date: August 5, 1991

BEFORE: **Honorable** Richard D. Cudahy, Circuit Judge, **Honorable** Kenneth F. Ripple, Circuit Judge, **Honorable** Jesse E. Eschbach, Senior Circuit Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 87 CR 557, Chief Judge James B. Moran

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the decision of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed August 2, 1991.

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-3071

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN DOE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 CR 557—**James B. Moran**, *Chief Judge.*

ARGUED FEBRUARY 12, 1991—DECIDED AUGUST 2, 1991

Before CUDAHY and RIPPLE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* In this criminal appeal, we must decide under what circumstances, if any, the United States is required to file a motion for correction of sentence under FED. R. CRIM. P. 35(b) ("Rule 35(b)" and "Rule"). In May 1988, John Doe ("Doe")[1] was convicted in the Northern District of Illinois of two counts of possession with intent to distribute cocaine and one

[1] To help protect the safety of Doe and his family, this Court has ordered that Doe remain anonymous in this appeal. In keeping with the spirit of our Order, only the facts absolutely necessary to a full understanding or our opinion will be disclosed.

count of conspiracy to distribute cocaine, *see* 21 U.S.C. § § 841(a)(1) and 846. He did not appeal his conviction. Within one year of sentencing, however, he moved the District Court to order the United States, based on his substantial assistance in the investigation of other crimes, to file a Rule 35(b) Correction of Sentence Motion, or in the alternative, to correct his sentence pursuant to Rule 35(b) notwithstanding the absence of a Government's motion. The District Court denied Doe's request. We affirm.

FACTUAL BACKGROUND

Subsequent to Doe's conviction and before his sentence in this case, Doe entered into agreements of cooperation (Defendant's Exhibits Nos. 1 and 2) with the United States Attorney's ("U.S. Attorney's") Offices in two districts outside of Illinois. In both of these agreements, Doe promised to provide substantial assistance in the investigation and prosecution of narcotics offenses. Defendant's Exhibit No. 1, ¶ 1; Defendant's Exhibit No. 2, ¶ 1. In return, the United States promised that any information provided by Doe pursuant to the agreements would not be used against him. Defendant's Exhibit No. 1, ¶ 3; Defendant's Exhibit No. 2, ¶ 4(a). In addition, assuming complete cooperation by Doe, the agreements bound the U.S. Attorney's Offices in the two districts to make every effort to persuade the U.S. Attorney for the Northern District of Illinois to file a motion for correction of sentence under Rule 35(b). Defendant's Exhibit No. 1, ¶ 8; Defendant's Exhibit No. 2, ¶ 4(e)(i).[2] Finally, the agreements required that informa-

[2] Rule 35(b) states:

> The court, on motion of the Government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court's authority to lower a sentence under this subdivision includes the authority to lower such sentence to a level below that established by statute as a minimum sentence.

tion learned from Doe would not be disclosed to anyone not ratifying the agreements to the benefit of Doe. Defendant's Exhibit No. 1, ¶ 10; Defendant's Exhibit No. 2, ¶ 5.

From all indications, Doe's cooperation pursuant to these agreements was unequivocal and exemplary.[3] Authorities in each of the two districts were thoroughly satisfied and each recommended in writing that a Rule 35(b) motion be filed in the case before us. But the U.S. Attorney for the Northern District of Illinois was persuaded that Doe's crimes were too serious to warrant any leniency regardless of his substantial assistance elsewhere. Consequently, the Government filed no Rule 35(b) motion in the present proceedings.

In September 1988, the District Court sentenced Doe.[4] Both sides agree that his conviction carried a statutory ten year mandatory minimum prison term, *see* 18 U.S.C. § 841(b)(1)(A).[5] The District Court sentenced him to fifteen years concurrently on the two substantive counts and suspended sentence on the conspiracy count. Based on his substantial assistance, Doe asked the District Court to reduce his sentence to ten years pursuant to the predeces-

[3] The U.S. Attorney for the Northern District of Illinois disputes this, contending that Doe has hidden some of his drug-derived assets from authorities. For purposes of this opinion, however, we will assume Doe has told all that he knows.

[4] Doe was convicted for crimes he committed before November 1, 1987. The Federal Sentencing Guidelines thus do not dictate his sentence. *See* Comprehensive Crime Control Act, Pub. L. 98-473 § 235(a)(1), 98 Stat. 1837, 2031 (1984); Sentencing Reform Amendments Act, Pub. L. 99-217 § 4, 99 Stat. 1728 (1985).

[5] The ten year minimum sentence imposed through the Anti-Drug Abuse Act of 1986, Pub. L. 99-570 § 1002, 100 Stat. 3207, 3207-2 (1986), became effective the day it was enacted, October 27, 1986. *United States v. Duprey*, 895 F.2d 303, 311-12 (7th Cir. 1989), *cert. den.*, 110 S.Ct. 1927 (1990); *see Gozlon-Peretz v. United States*, 59 U.S.L.W. 4107, 4110 (U.S. Feb. 19, 1991).

sor[6] of the current Rule 35(b). The District Court agreed and reduced Doe's sentence to the statutory minimum ten years.

Doe then sought to have his sentence reduced to less than ten years. Because the earlier version of Rule 35(b) does not authorize a reduction below a statutory minimum term, a sentence correction under the current version of Rule 35(b) (which does authorize such a reduction, *see supra* note 2) was necessary. But a Government motion is required to trigger the current Rule 35(b), and the U.S. Attorney for the Northern District of Illinois has continually refused to file the motion.

Doe then filed the motion at issue in this appeal. He asked the District Court to order the United States to file the Rule 35(b) motion, or in the alternative, to grant him a sentence correction without a Government motion. Doe has argued that the Illinois office is bound by one of the cooperation agreements to file the motion and, if not, that the Government's refusal to file the motion violated his constitutional rights. The District Court denied Doe's request, finding that the Illinois office owed no contractual obligation to file the motion and rejecting Doe's constitutional arguments. We agree with the District Court and affirm.

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[6] The earlier version of Rule 35(b) was announced by the Supreme Court on April 29, 1985:

> A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

Amendments to Rules, 105 F.R.D. 179, 183 (1985).

ANALYSIS

1. Which Rule 35(b) applies?

Before we can delve into the complexities surrounding breach of contract and due process, we are confronted with a rather disturbing question. Why should Doe receive the benefit of both the old and the new Rule 35(b)? The answer is that Congress says so.

The new Rule 35(b) was enacted by Congress as a part of the Comprehensive Crime Control Act of 1984. *See* Pub. L. 98-473 § 215(b), 98 Stat. 1837, 2016 (1984). The effective date of the amendment was November 1, 1987. *See* Pub. L. 98-473 § 235(a)(1); Pub. L. 99-217 § 4. Notwithstanding this effective date, Congress provided in the Sentencing Act of 1987 that the new Rule 35(b) would apply retroactively to crimes committed before November 1, 1987. *See* Pub. L. 100-182 § 24(3), 101 Stat. 1266, 1271 (1987).

But this does not prevent the old Rule 35(b) from applying. The Sentencing Act of 1987 also dictates that the prior version as announced by the Supreme Court on April 29, 1985, applies to all crimes committed before the effective date of the new Rule, November 1, 1987. *See* Pub. L. 100-182 § 22.

Because Doe's crimes were committed before November 1, 1987, he fits into a window where both versions of the Rule apply. The new Rule applies because it is retroactive. The old Rule applies because his crimes were committed before the effective date of the new Rule. Therefore, the District Court was authorized to reduce his sentence to ten years based on Doe's earlier motion and would be obligated, if Doe were successful in this appeal, to decide whether his sentence should be reduced any further.

2. Was the U.S. Attorney for the Northern District of Illinois contractually obligated to file a motion?

Doe argues that one of his cooperation agreements obligates the U.S. Attorney for the Northern District of

Illinois to file a Rule 35(b) motion. The cooperation agreements are contracts. If the United States breaches express or implied terms in these agreements, then it violates due process. *See Santobello v. New York*, 404 U.S. 257 (1971); *United States v. Lewis*, 896 F.2d 246, 249 (7th Cir. 1990); *United States v. Rexach*, 896 F.2d 710, 713-14 (2d Cir. 1990), *cert. den.*, 111 S.Ct. 433 (1990). But the content of the promises is a question of fact that will only be reversed if clearly erroneous. *United States v. Daniels*, 902 F.2d 1238, 1243 (7th Cir. 1990), *cert. den.*, 111 S.Ct. 510 (1990); *United States v. Strawser*, 739 F.2d 1226, 1229 (7th Cir. 1984), *cert. den.*, 469 U.S. 1038 (1984). The District Court finding under review is that the U.S. Attorney for the Northern District of Illinois did not accept "an obligation to persuade himself that a motion should be filed." Order Denying Rule 35(b) Motion.

Neither of the cooperation agreements contains *express* provisions to file the motion. The two agreeing districts have merely promised to "make every effort to persuade the . . . Northern District of Illinois, to file . . . a full and complete correction of sentence motion under Rule 35(b)." Defendant's Exhibit No. 1, ¶ 8; *see* Defendant's Exhibit No. 2, ¶ 4(e)(i). Nowhere in either document is a term expressly stating that the motion would definitely be filed. One of the agreements even counters such a reading by stating that Doe "understands . . . that the United States Attorney's Office in the Northern District of Illinois is not bound by that recommendation." Defendant's Exhibit No. 2, ¶ 4(d). And further, both contracts contain language that no other promises outside those contained in the written documents were made. Defendant's Exhibit No. 1, ¶ 11; Defendant's Exhibit No. 2, ¶ 7. No express promises can be found in these documents.

For many of the same reasons, Doe cannot establish an *implied* contractual right to the motion. Our Circuit has taken a restrictive view towards implying sentencing promises into agreements. *See United States ex rel. Robinson v. Israel*, 603 F.2d 635, 637-38 (7th Cir. 1979) (en banc) (holding that a promise to recommend a sentence between

ten and forty years did not prevent the Government from recommending to the parole board that the petitioner serve the maximum time possible), *cert. den.*, 444 U.S. 1019 (1980); *United States v. Mooney*, 654 F.2d 482, 485-87 (7th Cir. 1981) (holding that a Government promise to recommend a ten year prison term did not imply a promise not to resist the defendant's Rule 35 motion to reduce the sentence to ten years after the District Court had rejected the Government's earlier ten-year recommendation).

Other Circuits have more squarely faced the argument for an implied term to file a Rule 35(b) motion. The Eighth Circuit flatly rejects the notion:

> Furthermore, because of the extraordinary nature of the relief provided by [Rule 35(b)] and the clear dictate that the government must first file a motion before the court may depart, no defendant could reasonably read a plea agreement to bind the government to file a [Rule 35(b)] motion absent an explicit promise to do so. Therefore, *there can be no ambiguity in the absence of an express government promise in the plea agreements to file a [Rule 35(b)] motion.* An express promise to file a motion unambiguously binds the government. The lack of such a promise is clear evidence that such a promise was not made.

United States v. Coleman, 895 F.2d 501, 506 (8th Cir. 1990) (emphasis in original).[7] The Second Circuit also

[7] *Coleman* is actually an opinion construing the authority conferred by 18 U.S.C. § 3553(e) to impose a sentence below a statutory minimum based upon a defendant's substantial assistance. Throughout our opinion, we cite precedent construing Rule 35(b), § 3553(e), and Federal Sentencing Guidelines § 5K1.1 (permitting a district court to depart from the Sentencing Guidelines for substantial assistance) interchangeably. We do this because the language of all three provisions is parallel. Moreover, both Rule 35(b) and § 3553(e) limit the authority to impose or to reduce to a lower sentence "in accordance with the guidelines and policy statements issued by the Sentencing Commission." And so, Rule 35(b) and § 3553(e) must be read consistently with their Sentencing Guidelines counterpart, § 5K1.1.

takes a skeptical view towards implying such a term. In *Rexach*, the prosecutor specifically agreed to consider whether the defendant had offered substantial assistance that would warrant the filing of a Section 3553(e) motion, *see supra* note 7. When the prosecutor failed to file the motion, the defendant argued the agreement implied a term requiring the motion be filed. The Court held that because the cooperation agreement did not define specific objective standards for evaluating the degree of the defendant's assistance, the agreement did no more than "create broad prosecutorial discretion, limited only by the subjective good faith of the prosecutor." *Rexach*, 896 F.2d at 714.

But rather than advocating any express or implied right to the motion arising from the agreements as originally negotiated, Doe instead argues that the Illinois office has adopted and ratified one of the two agreements as its own. It is undisputed that the U.S. Attorney for the Northern District of Illinois received permission from the U.S. Attorney in one of the two agreeing districts to interrogate Doe under his agreement with that district. Further, the Illinois office concedes it is bound by the clause preventing the use of any information provided under the agreement against Doe. And finally, the Illinois office certainly learned of information provided by Doe under the agreement, thus triggering the Illinois office's obligation to ratify the agreement to Doe's benefit under the ratification clause. *See* Defendant's Exhibit No. 1, ¶ 10. Doe argues that through this ratification, the Illinois office has bound itself to the term requiring all efforts to be expended to persuade the U.S. Attorney for the Northern District of Illinois to file a Rule 35(b) motion. Doe continues that implicit in this promise is the promise to file the motion in this case.

True, the Illinois office has ratified the agreement, but ratification operates to bind a principal to the unauthorized promises made by an agent on behalf of the principal. *See Old Sec. Life Ins. Co. v. Continental Illinois Nat'l Bank & Trust Co. of Chicago*, 740 F.2d 1384, 1392

(7th Cir. 1984). Here, the only promises at issue made on behalf of a principal are those respecting use immunity. These terms are entered on behalf of the United States Government. The Illinois office has ratified these terms both through its concession and through operation of the ratification clause.[8] But with respect to Rule 35(b), ratification has no application. Ratification makes binding previously unauthorized promises *on behalf of a principal.* Promises made by an agent clearly in its individual capacity cannot be ratified by the principal through its actions. *See Stone v. First Wyoming Bank N.A., Lusk*, 625 F.2d 332, 345 (10th Cir. 1980). As already demonstrated, the promises relating to Rule 35(b) were made solely on behalf of the agreeing district and in no way attempted to bind the Illinois office. It makes no sense to speak of the Illinois office ratifying this promise because, even if it were ratified, the promise does not purport to require anything of the U.S. Attorney for the Northern District of Illinois.

Doe also misunderstands the effect of his interrogation by the Illinois office. Doe does not assert that the Illinois office asked him questions that the agreeing district could not have asked him under the agreement. Quite the contrary, the agreement specifically requires Doe to tell all he knows about criminal offenses committed anywhere in the United States, including Illinois. *See* Defendant's Exhibit No. 1, ¶ 1. Instead, Doe argues that the U.S. Attorney for the Northern District of Illinois, by interrogating him under the agreement, has adopted the agreement as its own and thereby accepted the obligations of the

[8] The clause of the agreement extending use immunity to Doe is entered into by the U.S. Attorney on behalf of "the United States Government." Defendant's Exhibit No. 1, ¶ 3. It is quite likely that the Illinois office was obligated to abide by this term regardless of whether it ratified the agreement or not. For a general discussion of the inherent or apparent authority of one governmental office to bind another governmental office in a plea agreement, see generally *Staten v. Neal*, 880 F.2d 962, 965-66 (7th Cir. 1989).

agreeing district. In essence, Doe contends that the right to interrogate him under the agreement could not be assigned to the Illinois office without its accepting all of the obligations to which the agreeing district is bound. But Doe's argument fails because the agreement plainly gives the agreeing district the right to designate agents to interrogate him. *See id.* Moreover, the agreement implicitly contemplates that prosecuting authorities from other jurisdictions would question him. *See* Defendant's Exhibit No. 1, ¶ 4. Indeed, from what we can glean from the scant record before us, it appears that Doe *himself* first invited the Illinois office to interrogate him in an effort to convince the U.S. Attorney for the Northern District of Illinois that his assistance was both genuine and complete. *See* Transcript of Hearing on Rule 35(b) at 56, 66.

In general, unless the parties have agreed otherwise, contract rights are freely assignable unless assignment would materially change the duties of the obligor, increase the obligor's risk, or impair the obligor's chance of obtaining return performance. *See Sally Beauty Co., Inc. v. Nexxus Products Co., Inc.*, 801 F.2d 1001, 1007 n.6 (7th Cir. 1986); *Overseas Dev. Disc Corp. v. Sangamo Constr. Co., Inc.*, 686 F.2d 498, 504 n. 10 (7th Cir. 1982); *Charles L. Bowman & Co. v. Erwin*, 468 F.2d 1293, 1297-98 (5th Cir. 1972); *Collins Co., Ltd. v. Carboline Co.*, 125 Ill.2d 498, 532 N.E.2d 834, 839-40 (1988); J. CALAMARI & J. PERILLO, CONTRACTS § § 18-10 through 18-16 (3d ed. 1987). Assignment here did not at all change Doe's duty to disclose his knowledge of criminal activity to those persons designated by the agreeing district, did not increase any of Doe's risks, and did not at all impact Doe's chances of obtaining return performance under the cooperation agreement. Therefore, the right to interrogate Doe under the agreement could be lawfully assigned to the Illinois office. Moreover, the assignment did not operate to delegate any contractual duties to the Illinois office.

We cannot say the District Court was clearly erroneous in finding no agreement to file a Rule 35(b) motion. The Illinois office was not required even to consider the rec-

ommendations of the other districts in making its decision because it was expressly *not bound* by the Rule 35(b) provisions of the cooperation agreements. The Illinois office received all of the benefits of the cooperation agreements without incurring any obligations because that is what the agreements allow.[9]

3. Did the refusal to file a Rule 35(b) motion violate due process as applied to this case?

Doe argues that the refusal to file the Rule 35(b) motion by the Government violated due process. He is not attacking Rule 35(b) on its face.[10] Rather, he alleges the

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[9] Doe also contends that estoppel and novation should work to bind the Illinois office. But in order to prevail under either theory, Doe must do more than argue that the Illinois office interrogated him under the agreement. As already established, the Illinois office could interrogate him under the agreement without incurring any obligation respecting Rule 35(b). And so, for Doe to prevail on his estoppel theory, he must show the Illinois office made a representation regarding Rule 35(b) upon which he reasonably relied to his detriment. *See Old Security*, 740 F.2d at 1392. Moreover, to estop the United States, Doe must show the Government's actions are tantamount to affirmative misconduct. *See United States v. Monroe Serv. Co.*, 901 F.2d 610, 612-13 (7th Cir. 1990). Even if Doe interpreted the interrogation by the Illinois office as saying something about Rule 35(b), surely the *fact* of the interrogation could only be an *innocent* representation not amounting to affirmative misconduct. And for Doe to establish novation, he must point to actions of the Illinois office evidencing an intent to be substituted in the agreement. *See CH2M Hill*, 895 F.2d at 290. Therefore, to obtain relief under either of these theories, Doe must do more than point to the fact that he was interrogated under the agreement. But because the record is hopelessly incomplete about this, we have no choice but to reject Doe's argument. If facts exist that could have helped Doe to prevail, it was Doe's duty to include them in the record on appeal. *See id.* at 288 n.2.

[10] We have soundly rejected the facial attack. Because a criminal defendant possesses no constitutional right to have the District Court individually consider his or her substantial assistance in sentencing, Congress does not violate due process by conferring

(Footnote continued on following page)

U.S. Attorney violated substantive due process as applied to the facts of this case.[11]

Twice recently, we have addressed the due process as applied attack that Doe makes. In both cases we rejected it. *See Donatiu*, 922 F.2d at 1334-36; *United States v. Bayles*, 923 F.2d 70, 72 (7th Cir. 1991). However, this Circuit has yet to articulate definitively the precise test to be used in answering the due process question. In *Bayles*, we indicated that the appropriate standard for reviewing the decision not to file a motion might be the same standard by which we review the Government's decision whether or not to prosecute a case. But neither case rejects that we might also review for prosecutorial bad faith. *Id.*; *Donatiu*, 922 F.2d at 1335.[12] But because Doe has offered

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[10] *continued*

the right conditioned upon the prosecutor's discretion. *United States v. Donatiu*, 922 F.2d 1331, 1333 (7th Cir. 1991); *United States v. Valencia*, 913 F.2d 378, 386 (7th Cir. 1990); *United States v. Lewis*, 896 F.2d 246 (7th Cir. 1990).

[11] Doe has also raised a procedural due process argument, but this argument must fail. In order to trigger requirements of due process procedures, Doe must establish that he has been denied a liberty or property interest—a legitimate claim of entitlement. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Thornton v. Barnes*, 890 F.2d 1380, 1386 (7th Cir. 1989). As we have already indicated, the Constitution provides no right to the individualized sentencing Doe seeks. *See supra* note 10. And Rule 35(b) provides Doe with no legitimate claim of entitlement absent a Government's motion. *See generally Thornton*, 890 F.2d at 1386 (Although the Constitution, not the statute or rule, provides the minimally due procedures, we must look to the procedures provided by the rule or statute to determine whether a legitimate claim of entitlement has been established.). Because the Government's refusal denied Doe no liberty or property interests, the Fifth Amendment's requirement of due process is not implicated. *See id.*

[12] Other Courts of Appeals have struggled with the question of how carefully to review the prosecutor's decision not to file the motion. The Eighth Circuit has indicated that the question might be whether prosecutorial bad faith or arbitrariness accompanies the decision. *See United States v. Smitherman*, 889 F.2d 189, 191

(Footnote continued on following page)

no evidence tending to show bad faith, we believe it unnecessary and unwise to imagine today a set of hypothetical facts showing prosecutorial bad faith that might warrant judicial review.

We accordingly restrict our analysis to Doe's equal protection claim, which we must reject.[13] Regardless of whether Doe has shown that others similarly situated were treated differently, Doe has failed to establish the differential treatment was motivated by an invalid purpose. Doe concedes he was not denied the motion based on his being a member of a suspect class. We must therefore look at the Government's motivation under rational basis scrutiny. Doe was convicted of three serious crimes. The U.S. Attorney has argued that if Doe's sentence were reduced any further, the deterrence value from the prosecution would be gutted. The District Court apparently agreed, stating in its Order that "the recent sentence reduction [under the old Rule 35(b)] reflects a proper accommodation between the assistance given and the offenses for which the defendant was convicted." Order Denying Rule 35(b) Motion.[14] On these facts, the Government's decision not to file the motion was clearly not based on impermissible grounds.

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[12] *continued*

(8th Cir. 1989). The First Circuit has hinted the standard might be arbitrary and capricious. *United States v. La Guardia*, 902 F.2d 1010, 1018 (1st Cir. 1990). But the Second Circuit has likened the decision not to file the motion "to other prosecutorial decisions, such as whether to press charges and which charges to press," and ruled that sentencing departure requests "must be given the same high level of deference." *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1990).

[13] "Although the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, it does contain an equal protection component." *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985).

[14] Based upon this finding, the Government has argued that even if it were required to file a motion, any error in failing to do so was harmless because the District Court has indicated that any Rule 35(b) motion would be denied. We need not reach this argument.

CONCLUSION

The District Court's finding that no promise was made by the U.S. Attorney's office to file the motion was not clearly erroneous. We also reject the contention that the choice not to file violated substantive due process as applied. The Government thus had no obligation to seek a correction of Doe's sentence based on substantial assistance. The decision of the District Court is

AFFIRMED.

CUDAHY, *Circuit Judge*, concurring.

I agree wholly with almost all that Judge Eschbach has written for the panel. I write separately only to indicate my belief that the proper test for measuring any prosecutor's refusal to file a Rule 35(b) motion is whether the refusal is arbitrary or in bad faith. *See United States v. Smitherman*, 889 F.2d 189, 191 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1493 (1990). *United States v. Bayles*, 923 F.2d 70, 71-72 (7th Cir. 1991), leans somewhat against finding such an exception, and *United States v. Donatiu*, 922 F.2d 1331, 1334-35 & n.3 (7th Cir. 1991), remains agnostic on the matter; neither resolved the issue definitively. Other circuits, as Judge Eschbach points out, are not consistent on the question, and at this time I believe that due process requires such an exception to the government's discretion.

RIPPLE, *Circuit Judge*, concurring. I join the judgment of the court.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 87 CR 557

UNITED STATES OF AMERICA

vs.

JOHN DOE,

Defendant.

O R D E R

This matter was heard upon defendant's in camera motion for an order compelling the government to file a Rule 35(b) sentence correction motion. The court has reviewed the evidence and testimony presented during the three sentence hearings which regard the defendant; it has also reviewed the arguments presented in the motion. Upon due consideration, it is therefore

ORDERED and ADJUDGED that defendant's motion regarding Rule 35(b) sentence correction is denied. This court does not necessarily accept the notion that the government has unbridled discretion to refuse to recognize substantial assistance. We do not believe, however, that the United States Attorney for the Northern District of Illinois accepted an obligation to persuade himself that a motion should be filed, no such motion was filed by the government in this cause and, in any event, we believe that the recent sentence reduction reflects a proper accommodation between the assistance given and the offenses for which the defendant was convicted.

/s/ JAMES B. MORAN
JAMES B. MORAN
Judge, United States District Court

9/13/89, 1989.